Board of Alien Labor Certification Appeals
U.S. Department of Labor
Washington, D.C.

DATE: March 4, 1997
CASE NO: 95-INA-279

In the Matter of:

FUDDRUCKERS
Employer

On Behalf of:

DORIA I. SALMERON-AMAYA
Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State, and the Attorney General, that at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27(c).

Statement of the Case

On June 27, 1994, Fuddruckers Restaurant("employer") filed an application for labor certification to enable Dora I. Salmeron-Amaya to fill the position of Pastry Cook at an hourly wage of $10.69(AF 32). The job duties are described as follows: "Prepare and bake cakes, cookies, pies and other pastries according to recipes and established procedures"(AF 32). The requirements for the position are two years of experience as a pastry cook or three years of experience as an assistant pastry cook.

On August 1, 1994, the CO issued a Notice of Findings("NOF") proposing to deny the labor certification. The CO challenged employer's classification of the job contending that Fast Food Cook, rather than Pastry Cook, more suitably described the position. As a result, the CO determined that employer violated section 656.21(b)(2) which concerns unduly restrictive job requirements. The CO also cited violations of section 656.21(b)(6) which provides that the job opportunity must be open to U.S. workers, and that U.S. workers can only be rejected for lawful job-related reasons.

In rebuttal, dated October 1, 1994, employer argued that the CO erred in classifying the position as Fast Food Cook. Employer contended that Pastry Cook is clearly appropriate because the position requires the worker to prepare and bake bread, cookies, pies and other pastries served at the restaurant. Employer also asserted that it held the job opportunity open to U.S. workers, and that employer rejected U.S. workers because none requested an interview.

The CO issued a Final Determination on November 14, 1994 denying the labor certification. The CO concluded that the suitable occupational title for the position was Fast Food Cook. Consequently, the CO determined that the requirements for two years experience as a pastry cook or three years as an assistant pastry cook were unduly restrictive. The CO also rejected the labor certification on the grounds that employer did not adequately document that the job opportunity was held open to U.S. workers. Finally, the CO stated that there was no evidence in the record which demonstrated that U.S. workers were rejected for lawful reasons.

On December 15, 1994, employer requested administrative review of Denial of Labor Certification pursuant to section 656.26. Employer submitted a brief in support of appeal on February 27, 1995.

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[1] All further references to documents contained in the Appeal File will be noted as "AF."

Discussion

The issues presented by this case are whether the employer described the job offering with unduly restrictive requirements, and whether employer held the job open to U.S. workers and provided lawful job-related reasons for their rejection.

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment of workers. The purpose of this section is to ensure that the job opportunity is made available to all qualified U.S. workers. *Venture International Assoc., Ltd.*, 87-INA-569 (Jan. 13, 1989) (en banc). Without such a proscription, unduly restrictive job requirements would have a chilling effect on the number of U.S. workers who may apply or qualify for the job opportunity. The employer must, therefore, document that the requirements listed on Form ETA-750 are normal for the occupation or that they are included in the Dictionary of Occupational Titles(DOT). The job opportunity is described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the DOT. *Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989) (en banc); *Duarte Gallery, Inc.*, 88-INA-92 (Oct.11, 1989).

Among the disputed issues in this case is whether this position is for Fast Food Cook or Pastry Cook. The outcome of this issue largely determines whether the requirements for the position are unduly restrictive. Employer contends that the position should be classified as Pastry Cook. Consequently, employer maintains that the requirements of two years of experience as a pastry cook, or three years of experience as an assistant pastry cook are appropriate. These requirements comport with those listed for Pastry Cook in the DOT. The CO, on the other hand, asserts that the appropriate occupational title is Fast Food Cook which has less stringent requirements than Pastry Cook. According to the DOT, the requirements for Fast Food Cook are six months to one year of experience in this occupation. Because of this finding, the CO determined that employer's job requirements were unduly restrictive.

In the Notice of Findings, the CO instructed employer to submit "a copy of the employers' menu as presented by the patrons of the restaurant [and]...explain why the menu reflects no pastry [and]...provide evidence or documentation that the nature of the job is in fact of a full-time pastry cook"(AF 19-20). In rebuttal, employer submitted a copy of the restaurant menu along with an explanation of employer's operations. Mr. Robert Dodson, one of the restaurant's managers, submitted a letter which stated that the alien "bakes the bread for the hamburgers, hot dogs, and other sandwiches served at Fuddruckers and prepares the brownies, pies and cookies also served at the restaurant"(AF 12). Mr. Dodson also reported that the desserts are not listed on the menu, but are displayed at a counter where customers order desserts(AF 12).

We believe that both employer and the CO have erred in classifying this position. The job is more properly classified as "Baker." DOT Code 313.381-010 lists the job duties of "Baker":

> Prepares bread, rolls, muffins, and biscuits according to recipe: Checks production schedule to determine variety and quantity of goods to bake...Molds dough into

loaves or desired shapes. Places shaped dough in greased or floured pans... Removes baked goods from oven and places goods on cooling rack. May bake pies, cakes, cookies and other pastries.

Baker has a Specific Vocational Preparation(SVP) of six, which means that a combined training, education and experience requirement of over one year and up to two years in the job offered is appropriate. Thus, employer's requirement of two years experience as a pastry cook, or three years experience as an assistant pastry cook, is unduly restrictive.

The CO's second basis for denial was that U.S. workers were rejected for other than lawful, job-related reasons, in violation of section 656.21 (b) (6). Generally, an employer may reject U.S. workers if it documents it made reasonable efforts to contact the applicants and they were unavailable. *Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989); *Churchill Cabinet Co.*, 87-INA-539 (Feb. 17, 1988). An applicant who does not respond may be found to be an unavailable worker. *H.C. LaMarche Enterprises, Inc.*, 87-INA-607.

Employer states that on May 17, 1994 it sent letters to four referral-applicants to invite them for interviews. Employer maintains that none of the applicants responded to the letters, and therefore the employer's rejection of these applicants is lawful. However, Ms. Regina Smith, one of the referrals, filled out a questionnaire from the Maryland Department of Economic and Employment Development on May 23, 1994, only six days after the employer sent letters to the applicants(AF 24-26). Ms. Smith states in the questionnaire that she telephoned the employer about the position, and that she was informed the position had been filled. In counsel's brief, employer acknowledged that someone called the employer, but did not leave a name nor did they ask to speak to one of the managers. *Brief, p. 6*. While this may be true, it is clear that after mailing out invitations to interview, employer should have anticipated telephone calls from applicants, and should have been prepared to answer inquiries accordingly. For this reason, we find employer's position to be unsupported. Therefore, Ms. Smith's rejection is unlawful under section 656.21(b)(6).

Accordingly, we find that certification was properly denied by the Certifying Officer.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and,**(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.